

CANADA / JUDGMENT

Greenfield v. Tran

2023 BCSC 1787

COURT

Supreme Court of British Columbia

DECIDED

14 September 2023

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2023 BCSC 1787 Greenfield v. Tran

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Greenfield v. Tran,

2023 BCSC 1787

Date: 20230914

Docket: M191911

Registry: Vancouver

Between:

Benjamin Greenfield

Plaintiff

And

Mai Thi Tran and Maika Nguyen

Defendants

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J. Kiedrzyn

Counsel for the Defendants:

J.P. Hamilton

A.M. Alden

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 14, 2023

Place and Date of Judgment:

Vancouver, B.C.

September 14, 2023

Introduction

- [1] THE COURT: The plaintiff seeks an order precluding the Court from considering evidence adduced at trial. The impugned evidence is the testimony of Warner Uhl, who was a witness to the motor vehicle accident at issue (the "Accident"). The basis of the application is the plaintiff's contention that the will-say statement produced by the defendants for Mr. Uhl's evidence did not provide adequate notice of his evidence.
- [2] If the Court does not agree to discard Mr. Uhl's testimony, in the alternative, the plaintiff seeks orders that:
- a) the defendants produce a proper will-say statement for Mr. Uhl;
 - b) Mr. Uhl be required to provide to the plaintiff all documents he reviewed in preparation for his testimony; and
 - c) the defendants produce to the plaintiff all documents they supplied to Mr. Uhl prior to his testifying in the present trial and at the trial that was originally set last year but was adjourned.
- [3] The defendants submit that the plaintiff had adequate notice of Mr. Uhl's evidence prior to trial as a result of correspondence between the plaintiff's counsel and Mr. Uhl. As such, no issues of trial fairness or trial by ambush arise, precluding the need for this Court to make any order. The defendants also object to the order sought in the alternative requiring production of documents that the defendants' counsel gave to the witness prior to testifying, as that may impinge upon the privilege attached to the solicitor's brief.
- [4] To put the issues in context, this trial addresses liability only. The Accident was a side-swipe collision caused by an improper lane change. The testimony of lay witnesses may be particularly important because although three experts provided evidence about accident reconstruction, none were in a position to opine as to which driver initiated the lane change that likely caused the collision. It is my understanding that the experts also opine that it is possible both drivers did so. It is no surprise that the testimony of the parties is

diametrically opposed on that crucial issue.

- [5] Mr. Uhl is one of two independent witnesses who testified on the Accident. He was a passenger in a vehicle driven by his wife, the other independent witness. They travelled directly behind the defendants' vehicle just prior to the Accident. Mr. Uhl provided a statement to the Insurance Corporation of British Columbia ("ICBC") dated January 10, 2018, which was about 10 days after the Accident. He signed the statement, and his signature was witnessed.
- [6] As noted, this trial was originally set to proceed last year in September 2022. The plaintiff had understood, based upon information from ICBC, that the black box data from the plaintiff's truck had not been retrieved. However, the plaintiff discovered, upon receipt of the defendants' expert report, that ICBC had, in fact, retrieved the black box data from the plaintiff's truck and had provided the data to its expert. The expert gave an opinion on causation. Needless to say, this caused an adjournment of the trial. It is also fair to say it probably put the plaintiff on high alert to the possibility of additional information ICBC did not disclose to the plaintiff during the course of litigation. That concern is directed at former counsel and ICBC as defence counsel before me did not begin representing the defendants until June of this year. This context is relevant to this application.
- [7] Prior to the trial of last year, I am told former counsel for the defendants produced a will-say statement for Mr. Uhl. There was a Trial Management Conference ("TMC") in June of this year, at which time the parties were ordered to produce will-say statements by August 25, 2023. The defendants' current counsel simply resent the original will-say statement with an updated date.
- [8] The will-say statement from Mr. Uhl in its entirety states:
- We anticipate that Warner Uhl will testify to his observations of the plaintiff and defendant vehicles before and during the collision. We also anticipate that he will testify to his observations regarding the dynamics of the collision and to his observations following the collision.
- [9] It is fair to say that when Mr. Uhl testified, his evidence-in-chief was more detailed and more specific. The issue is whether the failure to include in the will-say statement the specifics of his testimony amounts to trial by ambush and/or trial unfairness that must be corrected by either excluding his evidence or other orders.
- [10] The issue of evidence exclusion first arose during the course of Mr. Uhl's testimony. At that time, I suggested to counsel that Mr. Uhl finish his testimony and the parties address the issue during final submissions, and they agreed. Although final submissions will take place later due to the illness of one of the counsel, the issue was canvassed now, which was prudent in the event that I agreed with the plaintiff to order further production of documents.

- [11] In support of dismissing the application, the defendants point to the following three points. Firstly, no issue as to the adequacy of the will-say statement was raised at the TMC on June 1, 2023, even though it was the same will-say statement that was produced a year earlier. Secondly, there was another TMC in mid-July, and the order from June 1, 2023, was simply reaffirmed, and, again, no issue was raised.
- [12] Thirdly, the defendants note that there was pre-trial communication between the plaintiff's counsel and Mr. Uhl, which resulted in Mr. Uhl sending an email to the plaintiff's counsel. I will not reproduce the content of that email, but the pertinent points are that Mr. Uhl said he would give evidence similar to his statement, and that in his view, the plaintiff was at fault for the Accident.
- [13] The reference in his email to the "statement" is the statement that Mr. Uhl made on January 10, 2018. That statement was listed on the defendants' list of documents, and it is my understanding that it was discussed at the plaintiff's examination for discovery in April 2021.
- [14] It is apparent that there may be important differences between some of the details in the statement and Mr. Uhl's testimony. Specifically, in the statement Mr. Uhl said that there was light contact during the "first interaction" (as termed by the parties) between the vehicles. At trial, my recollection is that he said there was no contact between the vehicles at that point. Mr. Uhl also inconsistently described the plaintiff's location during the time he went to check on the plaintiff after the Accident.

Legal Principles on Will-Say Statements

- [15] The authority for will-say statements is Rule 12-2(9)(g) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR], which permits a judge presiding at a TMC to make an order directing that a party provide a summary of evidence that the party expects one or more of the party's witnesses will give at trial. As noted, such an order was made in advance of the original trial last year and, again, on June 1, 2023.
- [16] The plaintiff relies on two cases that address the issue. The first is *Creamore v. Parilla*, 2022 BCSC 2402, which was a damages-only trial. The defendants intended to call three ICBC employees as witnesses, and the plaintiff objected to them being called. At the TMC held before trial, there was an order that a list of witnesses and their will-say statements be provided two weeks before trial, by May 16, 2022, for every non-party, non-expert witness.
- [17] At para. 7, the court noted that while the plaintiff complied with that order, the defence did not, as no list of witnesses or will-say statement was produced in time.
- [18] At para. 21, the court commented on the content of a will-say statement:

- [21] The purpose of a will-say statement is well known. It is reflected in the language of Rule 12-2(9)(g), which expressly provides that at a TMC the court may direct that a party provide a summary of the evidence that the party expects one or more of the party's witnesses to give at trial. A non-exhaustive, generic list of potential topics is not "a summary of the evidence that the party expects the witness to give".
- [19] At para. 22, the court quoted from Justice Griffin in *Fu v. Zhu*, 2017 BCSC 749 at para. 20: [Proper pretrial disclosure] is part of what allows opposing parties to be prepared for trial and to be ready to meet and challenge the other side's case. It also allows for the efficient conduct of civil trials, all of which contributes to the fair administration of justice.
- [20] The plaintiff also relies on *Padda v. Lalli*, 2020 BCSC 1272, where at para. 25, the court comments on the form of a will-say statement. I will not reproduce that paragraph, but I note its importance.
- [21] At para. 26 of *Padda*, the court noted that the party did not provide a will-say statement for some witnesses, because those witnesses chose not to cooperate. Instead, the party provided the answers to written questions that witnesses provided in response to questions from counsel. The court found that the provision was adequate.

Analysis

- [22] In my view, the factual circumstances of *Creamore* and *Padda* are distinguishable from the facts before me.
- [23] For one thing, in both cases there was no will-say statement produced pursuant to the TMC order, whereas here, it is the content of the will-say statement that is at issue, not its production. I accept that a wholly inadequate will-say statement produced in time may still raise the same concerns as not producing one at all.
- [24] However, in *Creamore*, the plaintiff actually worked for ICBC. It was only after the plaintiff closed her case that the defence stated that three ICBC witnesses would provide not only general evidence about working conditions at ICBC, but that they would also comment specifically on the details of the plaintiff's work history. Ultimately, the court granted an order precluding the defence from calling those witnesses, and the conclusion at para. 34 is particularly important, though I will not reproduce it.
- [25] Thus, in *Creamore*, not only was no will-say statement produced, but the notice that counsel gave about the witnesses' testimony changed during the course of the very day when those witnesses were called. The nature of the testimony went from being very general information to being very specific about the plaintiff.
- [26] More importantly, those witnesses were ICBC employees, and therefore one could say they were under the control of the defendants in that case. They were not truly independent witnesses, as Mr. Uhl clearly is.

- [27] In this case, it has always been clear that Mr. Uhl was a witness to the Accident and would comment on what he saw. The plaintiff's complaint is that the will-say statement was not specific enough.
- [28] The defendants argue that the plaintiff's argument is more form over substance. They point out that through the efforts of his own counsel, the plaintiff actually had more specific information about Mr. Uhl's intended testimony in the email sent June 29, well in advance of the date set for exchanging will-say statements.
- [29] I agree. The email is very specific in that Mr. Uhl believed the plaintiff was at fault for the Accident and he confirmed this would be his testimony at trial. He also confirmed he would review the statement he signed before trial.
- [30] The issue about trial by ambush and trial fairness has to do with both procedural and substantive notice. The SCCR dictate procedural fairness, and where that has not been complied with, that may or may not give rise to a remedy. A lack of procedural compliance may be compensated by actual notice as in Padda. Despite not providing a will-say statement in time, the court was satisfied that the information provided by the plaintiff did not compromise trial fairness.
- [31] I come to the same conclusion here. In the email to the plaintiff's counsel, Mr. Uhl provided very clearly that he thought the plaintiff was at fault for the Accident. But for the two contradictions noted above, his evidence was generally consistent with his statement. Specifically, he said there were two interactions between the vehicles and his impression was that the plaintiff lost control. He also stated that he told the ambulance driver that he did not believe the plaintiff's statement to the driver-that the Honda caused the Accident-was accurate.
- [32] In my view, trial fairness has not been compromised, and I do not agree that the evidence should be excluded.
- [33] The plaintiff asked, in the alternative, that the defendants produce a proper will-say statement. I find that unnecessary, given that he has already testified, and given the content of his email.
- [34] I note that the defendants' counsel informed me he was unaware of the content of the email Mr. Uhl sent to the plaintiff's counsel, until Mr. Uhl sent it to him after the date for producing will-say statements had passed. On that basis, counsel says he is in the same position as the plaintiff's counsel with regard to knowing the specifics of Mr. Uhl's testimony. The defendants submit that tempers any prejudice arising from the content of the will-say statement.

- [35] The plaintiff also asked for an order that Mr. Uhl produce all documents he reviewed in preparing for his testimony. That is something that could have been asked during cross-examination. Nothing precludes counsel from exploring that topic with a witness when they are on the stand.
- [36] I agree that it would have been improper to ask that the defendants' counsel produce information relating to any exchanges he had with the witness, as that would amount to impinging on the solicitor's brief. But, since there is no property in a witness, again, that could have been explored with Mr. Uhl on the stand.
- [37] The fact that there may be inconsistency in Mr. Uhl's statement to ICBC does not justify excluding his evidence or recalling him. Any inconsistency may go to credibility if the statement was put into evidence or he was cross-examined on it.
- [38] The fact that witnesses do not always say what counsel think they will is a normal occurrence in litigation. This witness was independent. He was not under the control of any party. He may have chosen to cooperate more fully with defendants' counsel, and that was his right. That does not give rise to any concerns about trial fairness or trial by ambush unless counsel was implicated in some type of improper conduct. That allegation was not made, nor could it be made before me in this case.
- [39] I am not persuaded that the plaintiff did not have fair notice of Mr. Uhl's testimony such that trial fairness was impaired or that he was prejudiced in any way. This is just one of the vicissitudes of litigation--that witnesses may be uncooperative and/or may say things slightly different from previous statements that they have given.
- [40] The application is dismissed.

"Sharma J."

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